



**MUNICIPAL ATTORNEYS
INSTITUTE**

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**IMPLEMENTING WISCONSIN'S
NEW SMOKING BAN**

A. The Smoke Free Wisconsin Act

On May 18, 2009 Governor Jim Doyle signed Wisconsin Act 12 into law. Act 12 amended Section 101.123 of the Wisconsin Statutes. Wisconsin's Smoke Free Law goes into effect on July 5, 2010 and applies statewide. Act 12 expands the smoking prohibition to include "enclosed places" that are either "public places" or "places of employment".

B. Key Definitions

1. **"Smoking"** means burning or holding, or inhaling or exhaling from, any of the following items containing tobacco: a lighted cigar, cigarette, pipe, or any other lighted smoking equipment.
2. **"Enclosed place"** means a structure or area that has all of the following:
 - a) A roof and;
 - b) more than 2 **substantial walls**.
3. **"Substantial wall"** means "a wall with no opening or with an opening that either does not allow air in from the outside or that is less than 25 percent of the wall's surface area".
4. **"Public place"** means any enclosed place that is open to the public, regardless of whether a fee is charged or a place to which the public has lawful access or may be invited.
5. **"Place of employment"** means any enclosed place that employees normally frequent during the course of employment, including an office, a work area, an elevator, an employee lounge, a restroom, a conference room, a meeting room, a classroom, a hallway, a stairway, a lobby, a common area, a vehicle, or an employee cafeteria.

C. Smoking was previously prohibited in the following places

1. State Capital and immediate vicinity
2. Residence halls of colleges and universities
3. Day care centers and outside of day care centers when children are present
4. Educational facilities
5. Correctional facilities and on the grounds of juvenile correction facilities

D. In addition to C. above, Act 12 now prohibits smoking in these places

1. All restaurants and taverns

2. All retail establishments
3. All bowling centers
4. All skating rinks
5. Private clubs (any facility used by an organization that limits membership and is organized for recreational, social, political etc. purposes)
6. Common areas of multi-unit residential properties
7. Hotels, motels, bed & breakfasts, and tourist rooming houses
8. All municipal buildings
9. Sports arenas of all kinds including Lambeau Field and Miller Park, gymnasiums, & swimming pools (whether or not they fit the definition of an enclosed space)
10. Bus shelters and public conveyances
11. Health and medical centers including hospitals, physician's offices, treatment centers
12. Inpatient health care facilities (county home, nursing home, hospice, veteran's home)
13. Theaters
14. All other enclosed places other than listed above that are places of employment or public places

E. Where Act 12 allows smoking

1. Private residences
2. Certain residence rooms in assisted living facilities which are designated as smoking (a room used by only one person or a room in which 2 or more persons reside if every person who lives in that room smokes and each of those persons has made a written request to the person in charge of the assisted living facility to be placed in a room where smoking is allowed)
3. Tobacco retailers** who generate more than 75% of its revenue from the sale of tobacco not including cigarettes
4. Tobacco bars** which generate 15% or more of its revenue from the sale of cigars or pipe tobacco (vending machines are not included)

**Tobacco retailers and tobacco bars must have been in existence by 6/3/09; smoking of cigarettes is prohibited

F. Act 12: The Outdoors

1. Smoking was already prohibited outdoors in the following locations:
 - a) Within 6 feet of the State Capital
 - b) On the premise of a day care center when children are present
 - c) On the grounds of a Type 1 juvenile correctional facility
 - d) Within 25 feet of any University of Wisconsin-System residence hall or dormitory
2. In addition to the above list, Act 12 prohibits outdoor smoking in the following locations regardless of whether it meets the definition of an “enclosed space”:
 - a) Sports arenas (any stadium, pavilion, gymnasium, swimming pool, skating rink, bowling center, or other building where spectator sporting events are held)
 - b) Bus shelters
 - c) Public conveyances (a mass transit vehicle as defined in § 340.01 (28m), a school bus as defined in § 340.01 (56), or any other device by which persons are transported, for hire, on a highway or by rail, water, air, or guide wire within this state, but does not include such a device while providing transportation in interstate commerce)
3. Smoking needs to be a reasonable distance from smoke free places and entrances. See Section J, **Local Authority to Regulate Smoking**.

G. Responsibilities of the “Person in charge”

1. **“Person in charge”** means the person, or his or her agent, who ultimately controls, governs or directs the activities aboard a public conveyance or at a location where smoking is prohibited or regulated.
2. Where smoking is prohibited, a person in charge:
 - a) May not allow any person to smoke
 - b) May not provide matches, ashtrays, or other equipment for smoking
 - c) Shall make reasonable efforts to prohibit a person from smoking by posting signs, refusing service (if in a restaurant, tavern or private

club), asking the person to stop smoking and if he/she continues to smoke, ask him/her to leave. If he/she refuses to leave, contact law enforcement.

H. Enforcement

The lead enforcement agency is the Department of Justice. At the local level, law enforcement has the authority to issue citations. Act 12 grants the authority:

165.60 Law enforcement. The Department of Justice is authorized to enforce ss. 101.123 (2), (5), (2m), and (8), 944.30, 944.31, 944.33, 944.34, 945.02 (2), 945.03 (1m), and 945.04 (1m) and ch. 108 and is invested with the powers conferred by law upon sheriffs and municipal police officers in the performance of those duties. This section does not deprive or relieve sheriffs, constables, and other local police officers of the power and duty to enforce those sections, and those officers shall likewise enforce those sections.

I. Penalties

An individual in violation of the law will be fined \$100 to \$250. Persons in charge of a nonsmoking area will be fined \$100; however, the first violation requires a warning. The maximum daily fine for a person in charge is \$100 regardless of the number of violations. These amounts do not include court costs.

J. Local Authority to Regulate Smoking

1. Municipalities have the same authority to regulate INDOOR smoking that they did prior to Act 12. Municipalities may enact ordinances complying with the purpose of the Act 12 which is to “protect the health and comfort of the public”.

2. Municipalities can adopt more, but not less, stringent regulations of INDOOR smoking.

3. If a municipality enacts an ordinance regulating or prohibiting OUTDOOR smoking in certain areas, the ordinance:

- a) May apply only to public property under the jurisdiction of the municipality.
- b) Shall provide that the person in charge of a restaurant, tavern, private club, or retail establishment located in an area subject to the ordinance may designate an outside area that is a reasonable distance from any entrance to the restaurant, tavern, private club, or retail establishment where customers, employees, or persons associated with the restaurant, tavern, private club, or retail establishment may smoke. Such ordinance may not define the term "reasonable distance" or set any specified measured distance as being a "reasonable distance".

K. Smoking Violations and Liquor Licenses

Act 12 has specific language prohibiting a municipality from using smoking violations against a liquor license:

SECTION 76. 125.12 (1) (c) of the statutes is amended to read: 125.12 (1) (c) Neither a municipality nor the department may consider an arrest or conviction for a violation punishable under s. 101.123 (8) (d), 945.03 (2m), 945.04 (2m), or 945.05 (1m) in any action to revoke, suspend, or refuse to renew a Class “B” or “Class B” license or permit.

L. If the Municipality has No Local Ordinance

1. A municipality does not need to adopt § 101.123 to be in compliance with the new Smoke Free Law. State law allows municipalities to locally regulate smoking by ordinance, but does not require an ordinance be enacted.

2. State prohibitions apply locally and are enforced by state and local law enforcement and the DOJ as violations of state law. If a violation occurs, the local officers may write a citation. The matter is prosecuted in the county circuit court. The forfeiture is as stated in the state statute and court costs would be assessed in county circuit court.

M. If the Municipality has No Local Ordinance, but has a Municipal Court

1. Same as above, except a municipality may want to adopt § 101.123 or an ordinance that complies with the Smoke Free Law if it wants to enforce the law as a local matter, meaning a violation of a local ordinance. Then, the municipality would prosecute citations in municipal court.

2. The City of Hudson adopted the state statute under its public nuisance section which gives enforcement authority to a compliance officer.

N. If the Municipality has a Local Ordinance

1. The municipality should review the local ordinance to ensure that it is applied and enforced in ways that comply with the new Smoke Free Law. See **Local Authority to Regulate Smoking** above.

2. Do a comparison of local law and the Smoke Free Law. The more stringent law will apply in an analysis of INDOOR provisions. OUTDOOR provisions for the most part are analyzed in favor of the new state law. Depending upon the provisions of the local ordinance, enforcement may be a combination of local and state law.

O. State v. Local Law: City of Eau Claire

The City Attorney's office conducted a comparison of its local code and the new Smoke Free Law. Below are the results of that comparison.

1. Differing exemptions/prohibitions between state and local law.

a) The City exempts from the smoking ban: *Use of tobacco by an enrolled member of an Indian tribe, as those terms are defined in sec. 139.30(4) and (5), Wis. Stats., as part of a traditional spiritual or cultural ceremony.* The Smoke Free Law does not provide for this exemption, so it no longer is an exemption for the City. Enforcement is under state law.

b) The City exempts from the smoking ban: *Bed and breakfast establishments and hotel and motel rooms that are rented to guests and are designated as smoking rooms, provided that not more than twenty-five percent (25%) of the rooms rented to guests are designated as smoking rooms. This exemption does not include common areas.* The Smoke Free Law does not provide for this exemption and specifically prohibits smoking in all areas of hotels, motels, and bed and breakfasts. Enforcement is under state law.

c) The City exempts from the smoking ban: *Private residences, except when used as a child care facility, adult day care facility, or health care facility.* The Smoke Free Law provides an exemption for private residences and prohibits smoking in child care and health care facilities. Adult day cares are not addressed, but arguably would convert a private residence into a public place or work place by the nature of the business and occupants. Enforcement is under the city code.

d) The City exempts from the smoking ban: *Private clubs, except when used for a function to which the public is invited or permitted to enter. This exception shall not apply to any organization established to avoid compliance with the ordinance.* The Smoke Free Law provides no exemption for private clubs; therefore, private clubs would no longer be exempt from the prohibition. Enforcement is under state law.

e) The Smoke Free Law exempts from the smoking ban: *Assisted living facilities if a room used as a residence by only one person or a room in which all occupants have requested in writing to be allowed to smoke.* Prior to the amendment to state law, the City has treated these types of facilities as private residences (smoking allowed) except the common areas (smoking prohibited). Now, state law has narrowed the exemption. Enforcement is under state law.

f) The Smoke Free law exempts from the smoking ban: *A retail tobacco store or tobacco bar in existence on June 3, 2009. A retail tobacco store means a retail establishment that does not have a Class "B"*

intoxicating liquor license or a Class "B" fermented malt beverage license and that generates 75 percent or more of its annual gross income from the retail sale of tobacco products and accessories. A tobacco bar means a tavern that generates 15 percent or more of its annual gross income from the sale on the tavern premises, other than from a vending machine, of cigars and tobacco for pipes. A tobacco product means any form of tobacco prepared in a manner suitable for smoking but not including a cigarette. Even if an establishment meets these requirements, the smoking of cigarettes is prohibited; only cigars and pipes are allowed. The city code is more restrictive as both of these types of establishments are a retail store or tavern in a public place where smoking is expressly prohibited, and the code does not have an exemption for such establishments. The City's more restrictive code would prevail. Enforcement is under city code. This may be a nonissue as no establishments appear to meet the state exemption.

g) The Smoke Free Law prohibits smoking: *Public conveyances which includes "a mass transit vehicle as defined in § 340.01(28m), a school bus as defined in § 340.01(56), or any other device by which persons are transported, for hire, on a highway or by rail, water, air, or guide wire within this state..."* The city code prohibits smoking in city buses only. Enforcement is under city code for city buses. Enforcement of all other public conveyances is under state law.

2. Conflicting Enforcement between state and local law.

a) The City has granted the authority to multiple agencies, mainly the health department, for enforcement of the smoking ban. The state restricted local authority to law enforcement. The health department will continue to issue warning letters for state and city violations, but will only write citations for city code violations. State violations will be issued by the police department upon referral from the health department. Both city and state violations proceed to circuit court as the City has no municipal court. The fine with costs will be: (\$60 plus costs) \$213.10 for city violations and (\$100 plus costs) \$263.50 for state violations.

b) The City's procedure is to first issue a warning letter and citations are written for subsequent violations. This is consistent with the state law. However, the City will be limited by state law to one citation per day for a "person in charge". Since 2008, the City has issued approximately 20 warnings. Five citations have been issued to "persons in charge" (2 citations to one tavern, 3 citations to another tavern). Although the City could adopt the state violations to bring all enforcement under the health department, the citation history does not currently support a return of the ordinance to city council for amendment.

3. Signage.

- a) If a municipality has local “no smoking” signs indicating an applicable local code number, then those signs may continue to be used. If a municipality adopts the Smoke Free Laws as a local ordinance, it may use the local code.
- b) If a local code does not include some prohibited areas enumerated in the Smoke Free Law or there is no local code, the “no smoking” sign should indicate the state statute number.

P. **The Confusion – Enclosed Places and Substantial Walls**

1. Act 12 prohibits smoking in certain listed “enclosed places”, including restaurants, taverns, and any other enclosed place of employment or public place. “Enclosed place” means “a structure or area that has a roof and more than two substantial walls”. A “substantial wall” means “a wall with an opening that may be used to allow air in from the outside that is less than 25 percent of the wall’s surface area”. (Old definition)

2. The legislature (2009 Assembly Bill 720, Senate Amendment 1) recently amended the above definition of “substantial wall” to mean “a wall with no opening or with an opening that either does not allow air in from the outside or that is less than 25 percent of the wall’s surface area”. (New definition)

3. The Wisconsin Legislative Council Amendment Memo dated April 16, 2010, states that the effect of this amendment to the “substantial wall” definition is as follows:

- a) *A wall with no openings is considered to be a substantial wall. An argument could be made that Act 12’s definition of “substantial wall” excludes a solid wall with no openings.*
- b) *A wall with an opening that does not allow air in from the outside is a substantial wall. This means that a wall with closed windows, for example, would be considered to be a substantial wall. Under Act 12, a wall with closed windows covering 25% or more of the wall’s surface area would not be considered a substantial wall.*

4. Even with the new definition of “substantial wall”, the definition could be interpreted to permit smoking in areas thought to be indoor areas subject to the “no smoking” ban.

5. In a June 2010 article of *The Municipality*, Curt Witynski provided three helpful examples illustrating the confusion.

- a) *For example, some might argue that a room with four walls in which 25 percent of two of the walls is covered by windows that are*

cracked open does not come within the definition of enclosed place and is therefore open to smoking.

b) *Similarly, a business with sliding doors and large windows on two of its four walls could argue that the law permits smoking within the room when the windows and sliding doors are open.*

c) *Under such an interpretation, smoking would be allowed in a long narrow building with large doors on each end when the doors are kept open.*

6. Why is the “substantial wall” definition problematic?

a) We live in Wisconsin

b) It’s very cold in the winter

c) Smokers do not want to stand outside and smoke, especially in the winter

d) Tavern owners want to provide outside shelters for their patrons to drink and smoke

e) With the current definition a municipality and a tavern owner may disagree as to whether an “enclosed place” is indoors (no smoking) or outdoors (smoking)

7. Possible solutions may be:

a) A municipality has the authority to regulate the indoors, so adopt local definitions.

b) Regulate through other laws. For example, if taverns are applying to the municipality to build additions to existing buildings to create a smoking room/shelter, there may be other obstacles. For example: zoning, parking requirements, occupancy issues and number of restrooms, or nuisance issues.

8. Alternate Definition of “Enclosed Space”: City of Eau Claire

a) Since 2008, the City of Eau Claire has applied the following definition:

Enclosed area shall mean all space between a floor and ceiling that is enclosed on all sides by solid walls or windows (exclusive of doorways) which extend from the floor to the ceiling.

b) The above definition is most commonly referenced when taverns request to expand liquor licenses to outdoor areas created for smoking and

drinking. Using that definition, the City has approved numerous outdoor fenced in patio areas that are “smoking areas” or “beer gardens.”

c) The City will continue to use its code’s definition as it is more restrictive than the state definitions.

Q. **Implementation and Enforcement of Smoke Free Laws – City of Eau Claire**

1. In 2008, multiple City agencies, with the health department leading the way, worked together to develop educational materials, forms, letters and applications in preparation of the new law.

2. Under city code, the health department, the building inspections division, the fire department, the police department and the parks and recreation department all have enforcement authority:

a) City staff added to their inspection check lists the categories of “smoking,” “evidence of smoking” and “smoking signs”

b) All findings and complaints are directed to the health department

c) The complainant must be identified and give a statement that includes location, time and date of violation

d) Upon receipt of a complaint, the first contact by the health department at businesses and workplaces is with the person in charge

e) A warning letter is issued first

f) Repeated violations may result in the issuing of a citation

3. The types of Smoke Free Law Violations in Eau Claire include the following:

a) Lack of signage discovered on routine city inspections

b) Approximately 20 public complaints of people illegally smoking

c) Five citations have been issued (2 to one tavern, 3 to another tavern)

4. Related Complaints:

a) Individuals smoking on city sidewalks outside of businesses, restaurants and taverns, thus blocking the right of way for citizens using the sidewalks

- b) Businesses moving tables and chairs outside to create smoking areas on city sidewalks, again blocking the right of way for other citizens using the sidewalks
- c) Smoking on city property or private parking lots outside of restaurants and taverns while holding an open beer or glass of alcoholic beverage, which violates the city's open container ordinance
- d) Smoking "too close" to the entrance of a building, causing a dispute over what is a "reasonable distance"
- e) Patrons of one establishment standing outside and smoking in front of another business, thus blocking access to that business, blowing smoke into the business, and leaving behind cigarette butts
- f) General litter complaints due to piles of cigarette butts on the ground
- g) General noise complaints due to everyone standing outside of taverns late at night to smoke

5. Solutions to the Litter Problems:

- a) The City grants encroachments for businesses to put cigarette butt receptacles on city sidewalks
- b) The downtown association and business improvement districts were contacted to encourage and plan clean-up of areas outside of businesses
- c) City staff contacted businesses about the furniture on the sidewalks set out to accommodate smokers, and explained that it had to be removed

6. Solutions to Smoking and Drinking Alcohol Outside:

- a) Enforcement of the City's open container ordinance (open container on public property or private parking lots open to the public)
- b) Encouraging the posting of signage at taverns and restaurants that alcohol beverages are prohibited outside
- c) Creating legal areas for tavern patrons to drink and smoke:

(1) The initial issue to address is zoning. Is the tavern a permitted or conditional use in the zoning district? Does the zoning code distinguish between what is a restaurant and what is a tavern and does this change after 10 p.m.? What is the proposed

use of the outdoor area? With the drinking of alcohol, will there be music, a bar, extra lighting, or a recreation area?

(2) If the tavern is in a CBD (Commercial Business District) or C-2 (Neighborhood Shopping District) zoning district, it is a conditional use and the applicant for an outdoor expansion must first go to the Plan Commission. The Plan Commission looks at the proximity to residences and other businesses. It also has the authority to set conditions related to screening, exterior lighting, noise, and hours of operation. This process gives the city authority to regulate the use of the area. If the outdoor area becomes a problem, then the Plan Commission has the authority to revoke the conditional use permit.

(3) Taverns that are zoned C- 3 (Community Commercial District) in Eau Claire are a permitted use and do not have to proceed to the Plan Commission. Without the ability to place conditions, the city has limited avenues to address potential neighborhood concerns about noise, hours of operation, and other issues related to the use of the outdoor expansion.

(4) Whether or not the applicant proceeds to the Plan Commission, all applicants requesting a permanent expansion of an alcohol license are required to attend a meeting of the License Review Committee prior to City Council. The Committee consists of city staff from the following departments: fire, police, health, inspections, planning, city attorney's office, and the licensing specialist. The applicant presents an application to the committee. The application requires the following:

A site plan drawn to scale, which includes the distance from structures on the premise and adjoining parcels and the set-back of the fence from property lines, streets, sidewalks

Placement of any cooking equipment

Emergency exits

Access from the tavern to the fenced outdoor area

A security plan

Hours of operation

Any plans for music or loud speakers

The committee reviews all of these issues for compliance with state law, city code and policies, and will make recommendations to the

applicant. Minutes from the meeting and any concerns of the committee are included with the application which then proceeds to city council for approval or denial. The city council has not put conditions on approved alcohol licenses because a violation of those conditions would be difficult to enforce or use for a license revocation under Wisconsin Statutes Chapter 125.

R. **Questions of Interest**

1. Does an e-cigarette fall under the definition of smoking? No. An electronic cigarette, also known as an e-cigarette or personal vaporizer, is a battery-powered device that provides inhaled doses of nicotine by way of a vaporized solution. There is no tobacco. It is not “lighted”.
2. Can I smoke shisha in my hookah inside a business and not violate the smoking ban? Yes. The herbal or shisha material that is being smoked is not considered to be tobacco; thus does not fall under the ban.
2. What about casinos? Act 12 does not cover casinos because tribes are sovereign nations and the Wisconsin legislature does not have jurisdiction over them.
3. Are work vehicles covered? The Act lists vehicles as “places of employment” where smoking is prohibited. However, most vehicles may not fit the definition of “enclosed place”, thus not subject to the prohibition.
4. May indoor smoking areas be set aside? No. Act 12 repeals the authority of a person in charge of a building to designate rooms or parts of rooms as smoking areas.